BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SUSAN C. JOHNSON	)	
Claimant	)	
	)	
VS.	)	
	)	
STATE OF KANSAS	)	
Respondent	)	Docket No. 1,055,487
	)	
AND	)	
	)	
STATE SELF-INSURANCE FUND	)	

ORDER

STATEMENT OF THE CASE

Respondent and the State Self-Insurance Fund (respondent) requested review of the June 6, 2011, Preliminary Hearing Order entered by Administrative Law Judge Rebecca A. Sanders. Michael J. Unrein, of Topeka, Kansas, appeared for claimant. Bryce D. Benedict, of Topeka, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant's accidental injury arose out of and in the course of her employment and, therefore, held that claimant is entitled to medical care.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the May 31, 2011, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent concedes that the evidence in the record at this point shows that claimant's accidental injury occurred in the course of her employment. However, it denies the injury arose out of her employment, arguing that claimant's employment put her at no increased risk for the accident when compared with her activities away from her employment.

Claimant argues the evidence has shown that no risk personal to claimant contributed to her injury and at the time of the injury she was performing her regular work duties. Accordingly, claimant asks that the Board affirm the Preliminary Hearing Order of the ALJ.

The issue for the Board's review is: Did claimant suffer an accidental injury that arose out of her employment with respondent?

FINDINGS OF FACT

Claimant is employed by respondent at the Conflicts Office. On February 15, 2011, claimant was walking into a file room while holding some files when she saw an empty cardboard file box in the aisle. She reached down with her left arm and picked up the empty box. As she was lifting the box to set it on a table, she heard a pop in her left wrist and felt immediate pain and numbness. She had never had those symptoms before. Claimant was seen by Dr. Lynn Ketchum on March 1, 2011. After examining claimant, Dr. Ketchum believed that claimant had a partial or complete rupture of the flexor superficialis to the right fourth digit. He recommends an MRI and an EMG to determine the status of the ulnar nerve.

Claimant had a previous workers compensation injury in 2006 when she injured the thumb joint on her left hand. Dr. Ketchum was her authorized treating physician, and he released her as being at maximum medical improvement and gave her an impairment rating on June 8, 2010. In a letter to claimant's attorney dated March 29, 2011, Dr. Ketchum stated that claimant's previous condition would not make her more susceptible to the type of injury she sustained in February 2011. He also stated that "assuming the facts as she related them to me to be accurate, the incident certainly could be a competent cause for this injury . . ."

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[1]

[1] K.S.A. 2010 Supp. 44-501(a).

Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[2]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[3]

In *Hensley*[4], the Kansas Supreme Court adopted a risk analysis. It categorized risks into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the workman; and (3) neutral risks which have no particular employment or personal character. According to 1 Larson's *Workmen's Compensation Law*, Sec. 7.04 (2006), the majority of jurisdictions compensate workers who are injured in unexplained falls upon the basis that an unexplained fall is a neutral risk and would not have otherwise occurred at work if claimant had not been working.

K.S.A. 2010 Supp. 44-508(d) defines "accident" in part:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

---

[2] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[3] *Id.* at 278.

[4] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 258, 597 P.2d 641 (1979).

K.S.A. 2010 Supp. 44-508(e) defines "personal injury" and "injury":

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

The Kansas Supreme Court, in *Boeckmann,*[5] denied workers compensation benefits, holding that

> physical disability resulting from a degenerative arthritic condition of the hips which progressed over a period of years while the workman was employed is not compensable as an accident arising out of and in the course of his employment under the circumstances found to exist in the instant case.

Among the circumstances the court found to exist was that Mr. Boeckmann's disabling arthritis existed before his employment with Goodyear and that "the degenerative process will continue to progress long after his retirement."[6] The evidence was

> that Mr. Boeckmann's hip problems, or the disabilities arising therefrom, were [not] caused by his work at the Goodyear plant; that his employment did not cause his condition to occur; that the hip condition had been a progressive process; that increased activity was liable to aggravate the claimant's underlying problem but that almost any everyday activity has a tendency to aggravate the problem; that every time the claimant bent over to tie his shoes, or walked to the grocery store, or got up to adjust his TV set there would be a kind of aggravation of his condition. . . .
>
> . . . .
>
> . . . The examiner found, on what we deem sufficient evidence, that any movement would aggravate Boeckmann's painful condition and there was no difference between stoops and bends on the job or off.[7]

Similarly, in *Martin,*[8] the Kansas Court of Appeals held that "[i]njuries resulting from risk personal to an employee do not arise out of his employment and are not compensable."

---

[5] *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, Syl., 504 P.2d 625 (1972).

[6] *Id.* at 736.

[7] *Id.* at 738-39.

[8] *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, Syl. ¶ 3, 615 P.2d 168 (1980).

More recently, the Kansas Court of Appeals in *Johnson*[9] held:

> In an appeal from the final order of the Workers Compensation Board awarding compensation for an injury suffered by an employee at the workplace, under the facts of this case substantial evidence did not support the board's finding that the employee's act of standing up from a chair to reach for something was not a normal activity of day-to-day living.

The court found it significant that "Johnson had a history of three or four [prior] incidents of left knee pain. Her treating physician, Dr. Jennifer Finley, testified that '[i]t looks like she had had years of degeneration and had some previous problems, and it was just a matter of time.'"[10] Even more recently, the Kansas Supreme Court held in *Bryant*[11]:

> Even though no bright-line test for whether an injury arises out of employment is possible, the focus of inquiry should be on the [*sic*] whether the activity that results in injury is connected to, or is inherent in, the performance of the job. The statutory scheme does not reduce the analysis to an isolated movement–bending, twisting, lifting, walking, or other body motions–but looks to the overall context of what the worker was doing–welding, reaching for tools, getting in or out of a vehicle, or engaging in other work-related activities.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[12] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[13]

ANALYSIS

K.S.A. 44-508(e) provides that "an injury shall not be deemed to have been caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living". There has been no

---

[9] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, Syl. ¶ 3,147 P.3d 1091, *rev. denied* 281 Kan. 1378 (2006).

[10] *Id.* at 788.

[11] *Bryant v. Midwest Staff Solutions, Inc.*, __ Kan. __, __ P.3d __ (No. 99,913 filed July 29, 2011) (slip. op. at 15).

[12] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. _ , (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[13] K.S.A. 2010 Supp. 44-555c(k).

such showing in this case. The statute refers to the disability, not the accident and not the injury. This presupposes some causal connection between the personal preexisting condition and the resulting disability. The phrase "activities of day-to-day living" as used by K.S.A. 44-508(e) is not tied to the specific activity that the worker was performing when injured. Rather, it is intended to eliminate compensating disabilities, as in *Boeckmann*[14], where the activity at work did not contribute to the disability in any way beyond what the claimant experienced from his or her normal activities of day-to-day living. That is not the situation here.

Claimant's accident and injury is alleged to have resulted from a single traumatic accident, not from a series of repetitive traumas. The event was grasping and lifting an empty file box at work on February 15, 2011. She experienced an immediate onset of symptoms in her wrist and fingers. Her injury was later diagnosed as a flexor superficialis tendon rupture. Although claimant had suffered a prior injury to her left hand, specifically her left thumb, claimant had no known condition that would cause or contribute to the injury suffered in this case. According to Dr. Ketchum, the February 15, 2011 injury was unrelated to claimant's prior conditions. As such, there is no evidence that claimant's injury and/or disability resulted from a risk that was personal to the claimant. Therefore, as either a risk associated with the job or as a neutral risk, the accidental injury is compensable.

CONCLUSION

Claimant's February 15, 2011 accidental injury arose out of her employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Rebecca A. Sanders dated June 6, 2011, is affirmed.

IT IS SO ORDERED.

[14] *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

Dated this _____ day of August, 2011.

_____
HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Michael J. Unrein, Attorney for Claimant
Bryce D. Benedict, Attorney for Respondent and State Self Insurance Fund
Rebecca A. Sanders, Administrative Law Judge